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Supreme Court, U.S.
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No._____

In the

Supreme Court of the United States

LAMERS DAIRY, INC.,

Petitioner

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

ROBERT N. DUIMSTRA
Counsel of Record
MENN, TEETAERT & BEISENSTEIN, LTD.
222 N. ONEIDA STREET
APPLETON, WI 54911
(920) 731-6631

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture possesses statutory authority under the Agriculture Marketing Agreement Act of 1937, 7 U.S.C. §601 et seq. to exempt certain milk handlers from the market-wide pooling scheme established under Milk Marketing Order No. 30 and is required to establish orderly marketing thereunder.

2. Whether the United States Department of Agriculture's administration of the Agricultural Marketing Agreement Act with respect to Milk Marketing Order No. 30 violates the constitutional equal protection rights of Lamers Dairy, Inc.

LIST OF PARTIES

The parties below, as listed in the caption, are Lamers Dairy, Inc. and United States Department of Agriculture.

CORPORATE DISCLOSURE STATEMENT

Lamers Dairy, Inc. is a privately-held Wisconsin corporation. It has no parent corporation. No publicly-held company has any ownership interest in Lamers Dairy, Inc.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Lamers Dairy, Inc. v. United States Department of Agriculture*, 379 F.3d 466 (7th Cir. 2004). The Seventh Circuit affirmed the unpublished March 11, 2003 decision and order of the United States District Court for the Eastern District of Wisconsin and resulting judgment filed March 11, 2003 and the amended judgment filed by the District Court on May 9, 2003. *See* Appendices A-D.

STATEMENT ON JURISDICTION

The United States Court of Appeals for the Seventh Circuit filed its decision on August 13, 2004. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) for review on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment.

No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

Title 7 United States Code, Section 608c (in relevant part)

(5) Milk and its products; terms and conditions of orders. In the case of milk and its products, orders issued

pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. . . .

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a

representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, (d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among

producers on the basis of their marketings of milk during a representative period of time, which need not be limited to one year; (e) a provision providing for the accumulation and disbursement of a fund to encourage seasonal adjustments in the production of milk may be included in an order; and (f) a further adjustment, equitably to apportion the total value of milk purchased by all handlers among producers on the basis of their marketings of milk, which may be adjusted to reflect the utilization of producer milk by all handlers in any use classification or classifications, during a representative period of one to three years, which will be automatically updated each year. . . .

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

STATEMENT OF THE CASE

In March 2000, Lamers Dairy, Inc. ("Lamers") filed its *pro se* "New Petition for Exemption from Certain Regulations and/or Modification of Certain Provisions of Federal Milk Order 30 (7 C.F.R. Pt. 1030) Both Chicago and Midwest" (the "Petition") with the Secretary of Agriculture. The Petition was filed pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (the "AMAA") and the federal Milk Marketing Agreement Order No. 30 (7 C.F.R. Pt. 1030) entitled "Milk in the Upper Midwest Marketing Area" ("Milk Marketing Order No. 30").

The matters relating to the Petition proceeded to a hearing in Appleton, Wisconsin before an Administrative Law Judge ("ALJ") on November 1, 2000. By Decision and Order dated May 2, 2001, the ALJ dismissed the Petition of Lamers.

Lamers appealed this Decision and Order to the Secretary of Agriculture by an Appeal to the Secretary dated June 5, 2001. Following further administrative review, the Judicial Officer subsequently dismissed Lamers' Petition for a second time by a Decision and Order dated August 11, 2001. Through its retained trial counsel, Lamers timely filed its Bill in Equity with the District Court in September 2001.

On May 9, 2003, the District Court entered an Amended Judgment in a Civil Case against Lamers and in favor the respondent, United States Department of Agriculture (the "USDA"). This Amended Judgment affirmed the decision of the Judicial Officer; denied Lamers' Bill in Equity; granted the USDA's motion for summary

judgment; denied Lamers' motion for reconsideration; assessed judgment against Lamers in the total amount of $850,931.26 as of March 21, 2003; and ordered Lamers to cease and desist from violations of Milk Marketing Order No. 30.

Through its appellate counsel, Lamers timely appealed the District Court's Amended Judgment to the United States Court of Appeals for the Seventh Circuit. By its published decision dated August 13, 2004, the Seventh Circuit Court of Appeals affirmed the judgment of the District Court.

STATEMENT OF FACTS AND REGULATORY SCHEME

1. Introduction

Lamers is a family-operated dairy business in Appleton, Wisconsin which has been in existence since 1913. Its principal business is handling and packaging fluid milk, which is also called Grade A or Class I milk. Because the fluid milk processed and packaged for sale is purchased by Lamers from milk producers (i.e. diary farmers), Lamers is classified a "handler" under Milk Marketing Order No. 30. Consequently, Lamers is subjected to regulation by the AMAA under Milk Marketing Order No. 30 as a handler.

Prior to January 2000, when federal milk order reform was implemented, Lamers was a partially regulated non-pool plant. In January 2000, Lamers became a fully-regulated pool plant under the revised Upper Midwest Milk Order.

2. Milk Classification and Uniform Pricing Under the AMAA

Under the AMAA, milk is classified according to its use. Class I milk, or fluid milk, represents milk intended for use as beverages. Class II milk is used for soft milk products such as cottage cheese, sour cream, yogurt, and ice cream. Class III milk is used for hard cheese and cream cheese products. Class IV milk is used in the butter and dry milk powder market.

Historically, the federal milk regulation system was established so that all producers might equally share in the premium fluid market even if the producers' milk were utilized in lower valued classes. Lower per capita milk consumption, coupled with increased milk production, has resulted in greater manufacturing utilization. Class I milk no longer dominates the market, with Class I utilization under Milk Marketing Order No. 30 comprising approximately 15-20% of pooled milk while Class III utilization encompasses 75-80% of pooled milk.

In any event, milk orders issued under the AMAA fix minimum prices for each end use classification. *See* 7 U.S.C. §608c(5)(A). These minimum prices are to be uniform to all handlers, subject only to adjustment for (1) volume, market, and production differentials customarily applied by the handler subject to the milk orders, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of the milk, or any use classification thereof, is made to such handlers. *Id.*

The AMAA further requires handlers to pay producers the blend price, regardless of the end use of the milk purchased by the handlers. This payment amount is determined either through an individual handler pool, which requires uniform pricing for all producers delivering milk to the same handler (*see* 7 U.S.C. §608c(5)(B)(i)) or through market-wide pooling, which requires uniform pricing for all producers delivering milk to all handlers within a marketing area, irrespective of how individual handlers actually make use of such delivered milk (*see* 7 U.S.C. §608c(5)(B)(ii)). Milk Marketing Order No. 30, along with all of the other current federal milk orders, has implemented the market-wide pooling approach specified under 7 U.S.C. §608c(5)(B)(ii). As further explained below, payment adjustments among handlers are also authorized by the AMAA so that the total sums paid by each handler equals the value of the milk purchased by such handler, according to the minimum prices established. *See* 7 U.S.C. §608c(5)(C).

As noted by the Seventh Circuit, "[a] driving purpose of the AMAA was 'to remove ruinous and self-defeating competition among the producers and permit all farmers to share the benefits of fluid milk profits according to the value of goods produced and services rendered." *Lamers Dairy, Inc. v. USDA*, 370 F3d 466, 469 (7th Cir. 2004) (quoting *Zuber v. Allen*, 396 U.S. 168, 180-81 (1969)). The Seventh Circuit thereby concluded that "[t]he AMAA, as amended, thus ensures that producers receive a uniform minimum price for their product, regardless of the end use to which it is put." *Id.*

Pooling v. De-Pooling

The uniform minimum pricing for producers is accomplished through "pooling", a process which blends the prices of the different classes of milk on a monthly basis. Through the pool's producer settlement fund, handlers who pay less to producers than the guaranteed uniform blend price must make compensating payments into the fund, while handlers who pay more to producers may withdraw compensating payments from the fund. According to the Seventh Circuit, "[t]he system of compensating payments into and out of the settlement fund thereby fulfills the AMAA requirement that 'the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed.' 7 U.S.C. §608c(5)(C)." *Id.* at 470.

Notwithstanding the requirements of 7 U.S.C. §608c(5)(B)(ii) and 7 U.S.C. §608c(5)(C) regarding market-wide pooling and total sum payment valuation, the USDA currently only requires Class I handlers to participate in the regulatory pooling scheme under Milk Marketing Order No. 30. In other words, Class II, III and IV handlers may either pool the producer milk they purchase in the Upper Midwest Marketing Area or keep this producer milk outside of the minimum pricing structure of the AMAA, i.e. "de-pool." The "all handlers" and "each handler" language contained in the various provisions of 7 U.S.C. §608c of the AMAA is not applied in practice by the USDA in administering the milk regulation.

Class III handlers have an economic incentive to de-pool during months when price inversion occurs, i.e.. when the Class III prices exceed the Class I prices. Increased

demand for cheese and other manufactured products should cause a flip-flop in pool draws, where Class I handlers would draw from the producer settlement fund and Class III handlers would pay into the producer settlement fund.

However, de-pooling effectively reduces the money pool of the producer settlement fund because Class III handlers avoid making the pool payments by keeping their purchased milk outside of the AMAA's minimum pricing structure. De-pooling the higher-priced Class III milk also reduces the blend price of the milk that remains pooled.

The USDA admits that class price inversion "causes serious competitive inequities among dairy farmers and regulated handlers," Milk in the New England and Other Marketing Areas, Dep't of Agric., 64, Fed. Reg. 16, 026, 16, 102 (Apr. 2, 1999). According to the USDA, class price inversion places Class I handlers and producers at a "competitive disadvantage" when compared to the manufacturing milk market handlers and producers. *Id.* This "inequitable situation" has developed as a result of Class I milk being mandatorily pooled while milk for manufacturing uses is allowed to be pooled voluntarily. *Id.*

REASONS FOR GRANTING THE PETITION

1. THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION CONCERNING THE ADMINISTRATION OF FEDERAL MILK REGULATION WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND THE ENABLING LEGISLATION AND WHICH CONTRAVENES

LAMERS' CONSTITUTIONAL EQUAL PROTECTION RIGHTS.

The fundamental declared Congressional policy of the AMAA is to establish parity pricing to farmers through the establishment and maintenance of orderly marketing conditions. 7 U.S.C. §602(1). This Court has indicated that the AMAA's regulation of milk is intended "to raise producer prices" and "to ensure that the benefits and burdens of the milk market are fairly and proportionally shared by all dairy farmers." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 342 (1984). Through the milk order system which implements the producer settlement fund, "all producers supplying a market area receive the same price" and "all handlers pay at least the minimum price specifically applicable to the milk's end use." *Minnesota Milk Producers Assoc. v. Glickman*, 153 F.3d 632, 638 (8th Cir. 1998).

In *Zuber v. Allen*, 396 U.S. 168 (1969), this Court rejected the Government's reading of the AMAA as permitting nearby differentials, holding that to do so would "perpetuate economic distortion and freeze the milk industry into the competitive structure that prevailed in the 1920s'." *Id.* at 181. Likewise, this Court refused to allow nearby producers "to appropriate monopoly profits [under a regulatory umbrella] that were never secure in the unregulated market." *Id.* This Court determined not "to follow a path not marked by the language of the statute." *Id.* However, the Seventh Circuit's conflicting decision in this case has done just that in rejecting Lamers' appeal. Therefore, review by this Court is warranted.

The Seventh Circuit's published decision in this case directly contravenes these foundational principles of the AMAA by failing to consider or give effect to the clear market-wide pricing and payment mandates set forth in the enabling legislation. In fact, the Seventh Circuit merely accepts the Secretary's distinction between Class I and Class III handlers based on end use without reference to the enabling legislation of the AMAA under which the Secretary is required to act. While Milk Marketing Order No. 30 may contain authority for the USDA to allow non-fluid milk handlers to de-pool, the AMAA contains no terms and conditions which allow federal milk orders to be so written. See, e.g., 7 U.S.C. §608c(5), (5)(A), (5)(B)(ii), and (5)(C) (orders shall contain one or more of the enumerated terms and conditions, which refer and apply to all handlers, and may contain no others).

Furthermore, by giving effect to the USDA's misapplication of the market-wide regulatory scheme through permissive de-pooling, the Seventh Circuit perpetuates the administration of the Milk Marketing Order No. 30 in a manner detrimental to the milk producers who are supposed to benefit under the AMAA. The Seventh Circuit implicitly acknowledges this result in stating that, "during times of price inversion, Class III handlers who de-pool may pay *less than* the Class III price." *Lamers Dairy, Inc. v. United States Department of Agriculture*, 379 F.3d at 472. The concomitant result is that Class III producers may receive less than the Class III price from handlers who de-pool during times of price inversion, which is in direct contradiction to this Court's application of the AMAA for the benefit of "all farmers." *See, e.g., Zuber v. Allen*, 396 U.S. at 180-81; *Block v. Community Nutrition Inst.*, 467 U.S. at 342. In fact, based

on information provided by the Order No. 30 Market Administrator for use in Public Hearing Docket No. AO-361-A39; DA-04-03 August 2004 with respect to 2003 through June 2004, Lamers estimates that more than $140 million has been withheld from the producer settlement fund under Order No. 30 due to de-pooling.

The USDA's administration of Milk Marketing Order No. 30, as upheld by the Seventh Circuit, directly conflicts with the public policy and underlying principles of the AMAA. By exempting certain handlers (Class III handlers in particular) from the minimum uniform pricing requirements of 7 U.S.C. §§608c(5)(A), (5)(B)(ii), and (5)(C) through permissive de-pooling under Milk Marketing Order No. 30, the Secretary of Agriculture has exceeded the powers entrusted to her by Congress. Furthermore, because the AMAA and Milk Marketing Order No. 30 are applied to certain milk handlers like Lamers but other milk handlers are permitted to escape the uniform pricing and payment requirements imposed thereunder, Lamers' constitutional equal protection rights are violated by the USDA's administration of the AMAA and Order No. 30.

Lamers' constitutional challenge to the exemption of Class III handlers from pooling requirements is based on the enabling legislation of the AMAA, which does not authorize the de-pooling currently allowed by the USDA and tacitly approved by the Seventh Circuit. The Seventh Circuit acknowledges that "the Class III pooling exemption is economically harmful to Lamers and other Class I handlers (as well as to producers committed to dealing with them) who must suffer the effects of Class III de-pooling", but then summarily concludes that this harm "does not rise to the level

of 'invidious discrimination.'" *Id.* at 475-76. However, because the AMAA applies uniform pricing and payment structures to all handlers irrespective of milk use, Lamers is entitled (along with other Class I handlers) to equal protection with respect to market-wide pooling requirements under Milk Marketing Order No. 30.

This Court "must give effect to the unambiguously expressed intent of Congress" when it "has directly spoken to the precise question at issue." *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under the AMAA, Congress dictated a regulatory scheme of minimum prices for each use classification which all handlers shall pay (7 U.S.C. §608c(5)(A)), uniform prices as to all handlers (*id.*), payment of uniform prices to all producers and associations of producers delivering milk to all handlers (7 U.S.C. §608c(5)(B)(ii)), and payment adjustments among handlers so that the total sums paid by each handler equals the minimum price value of the purchased milk (7 U.S.C. §608(5)(C)) (emphasis added). Furthermore, because the AMAA deals with milk and its products, the term "handlers" cannot be limited to only Class I handlers such as Lamers. 7 U.S.C. §608c(5).

Nevertheless, through de-pooling under Milk Marketing Order No. 30 which the Secretary administers and which the Seventh Circuit condones, the statutory requirements of the AMAA applicable to "all handlers" is flouted when non-fluid market milk is allowed to be kept out of the regulatory scheme. Interestingly, the Secretary of Agriculture had previously found an "artificial economic advantage for non-pool milk which necessarily is created by the classified pricing and pooling of pool milk under the

order." 18 Fed. Reg. 8444, 8448. In connection with the resulting regulatory assessment imposed by the Secretary on the non-pool outside milk in that particular situation, this Court concluded that the Secretary of Agriculture had exceeded the powers entrusted to him by Congress. *Lehigh Valley Cooperative v. U.S.*, 370 U.S. 76, 99 (1962). However, the USDA is now taking the opposite approach in seeking to preserve its administration of Milk Marketing Order No. 30 with the "artificial economic advantage" it provides to Class III handlers in particular. It does so without statutory authorization.

If depooling of certain classes of milk was an important component of milk price regulation, Congress could have given its blessing to such a scheme by carving out a specific exception to the uniform pricing and payment requirements of the AMAA. *See Zuber v. Allen*, 396 U.S. 168, 185 (1969) (nearby payment could have been specifically excepted by Congress if significant in the milk distribution industry). The AMAA details a comprehensive market-wide regulatory scheme while making no mention of non-fluid (or fluid) milk depooling. The uniformity and fairness of the milk classification, pricing, and payment systems of the AMAA hinges on its application to all producers and all handlers. 7 U.S.C. §608c(5)(A).

This Court has stated that "[t]he plain thrust of the federal statute was to remove ruinous and self-defeating competition among the producers and permit all farmers to share the benefits of fluid milk profits according to the value of goods produced and services rendered." *Zuber v. Allen*, 396 U.S. at 180-81. However, because the federal price support system implemented in 1949 provides a "safety-net"

for producers, it effectively eliminates "ruinous and self-defeating competition" among them. By contrast, the Seventh Circuit's perpetuation of Class III handlers' depooling practices which are not authorized under the AMAA represents a serious equity issue and is inconsistent with the concept of orderly marketing conditions which the Secretary is charged with establishing and maintaining. *See* 7 U.S.C. §602(1).

CONCLUSION

For of all the foregoing reasons, the petitioner, Lamers Dairy, Inc., respectfully requests that this Court grant review of this matter.

Respectfully submitted,
Attorney Robert N. Duimstra
Menn, Teetaert & Beisenstein, Ltd.
P.O. Box 785
Appleton, WI 54912-0785

Attorneys for Petitioner

APPENDIX A

379 F.3d 466 (7th Cir. 2004)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LAMERS DAIRY INCORPORATED,
Plaintiff-Appellant,

v.

Nos. 03-2308 & 03-2661

UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 01 C 890 - William C. Griesbach, *Judge*

February 10, 2004, Argued
August 13, 2004, Decided

Before RIPPLE, ROVNER and DIANE P. WOOD, Circuit Judges.

RIPPLE, *Circuit Judge.* Lamers Dairy ("Lamers") sought an exemption from Milk Marketing Order No. 30, promulgated under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 et seq. After the Secretary of the United States Department of Agriculture ("the USDA") denied the petition in a final administrative order, Lamers sought review in the district court. The USDA counterclaimed for enforcement of the Secretary's decision and for a judgment against Lamers in an amount equal to the unpaid monetary assessments due under the terms of the marketing order. The district court granted summary judgment to the USDA on

Lamers' complaint and on the USDA's counterclaim. It ordered further proceedings on the amount due. Subsequently, the district court denied a motion for reconsideration by Lamers and entered an amended judgment awarding the Government $ 850,931.26. Lamers appeals. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I
BACKGROUND

A. Facts

Lamers Dairy, a Wisconsin family-operated dairy, has as its principal business the handling and packaging of fluid milk. In this appeal, Lamers challenges aspects of the federal milk-marketing regulatory scheme. To understand the nature of Lamers' challenges, we must discuss briefly the dairy industry and the regulatory and market forces governing it.[1]

1. The Dairy Industry

In the dairy industry, dairy farmers, also referred to as "producers, " produce and sell raw milk to "handlers." Handlers, in turn, prepare the milk product for resale to consumers or serve as intermediaries to those who do. Consumer dairy products, such as fluid milk beverages, ice cream and cheese, can all be produced from "Grade A" or "fluid grade" raw milk.[2] In the consumer market, however,

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[1] For additional background discussions, upon which this opinion has relied substantially, see *Zuber v. Allen*, 396 U.S. 168, 172-74, 24 L. Ed. 2d 345, 90 S. Ct. 314 (1969); *Alto Dairy v. Veneman*, 336 F.3d 560, 562 (7th Cir. 2003); *Stew Leonard's v. Glickman*, 199 F.R.D. 48, 49-50 (D. Conn. 2001); and Alden C. Manchester & Don P. Blayney, *Milk Pricing in the United States*, Market & Trade Economics Div., Dep't of Agric., Agric. Info. Bull. No. 761 (Feb. 2001).

[2] Grade B milk, on the other hand, which is subject to slightly less stringent sanitary standards, cannot be used to produce fluid milk beverages. In 1999, only about three percent of milk marketed failed to

milk beverages generally command a higher price than non-fluid products, which are known also as "manufactured dairy products." For this reason, the market into which dairy farmers sell their product more highly values (and pays a premium price for) Grade A milk ultimately used to produce beverage milk. This market premium based on end use creates an incentive among producers to divert their Grade A product to fluid milk handlers.[3] Were this incentive not controlled, lower market prices would result, harming milk production revenues.[4]

The dairy industry also is characterized by daily and seasonal fluctuations in supply and demand. Consumer demand fluctuates significantly on a daily basis, primarily due to consumer buying patterns; milk production, on the other

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meet Grade A standards. *See* Manchester & Blayney, *supra* note 1, at 2.

[3] Prior to refrigeration, not all producers could pursue these premium prices. We have discussed previously the change to the market precipitated by refrigeration:

> If milk were perishable, as it was in the days before refrigerated storage and transportation, dairy farmers serving urban markets (where milk is more likely to be consumed in fluid form than made into cheese or butter) would get higher prices for their output than dairy farmers remote from cities, who being unable to ship their milk a long distance would perforce sell most of it to manufacturers of cheese and other dairy products. But when refrigerated storage and transportation arrived on the scene, it became feasible for the remote dairy farmers--Wisconsin dairy farmers, for example--to ship milk to cities in other states, pushing down the price of fluid milk there and so hurting the dairy farmers who were located near those cities.

Alto Dairy, 336 F.3d at 562. This change in the competitive environment provided an impetus for regulation. *See id.* at 562-63.

[4] *See Alto Dairy*, 336 F.3d at 563 ("Such a diversion, what economists call 'arbitrage,' would undermine and, if uncontrolled, . . . reduce the incomes of dairy farmers as a group.").

hand, is relatively constant on a daily basis. Conversely, milk production varies seasonally based on the animals' nutritional health. In fall and winter months, less milk is produced, but in spring and summer months, more milk is produced. To meet consumer demand in the winter, producers must maintain large herds; these same herds over-produce in the summer. Given milk's perishable quality, the supply must go to market at least every other day. Historically, handlers were thus able to obtain summer supplies at bargain prices.

2. The Regulatory Scheme

In the wake of the Great Depression, in an attempt to address these unique industry characteristics, Congress enacted various provisions governing the dairy industry as part of the Agricultural Marketing Agreement Act of 1937 ("the AMAA"). A driving purpose of the AMAA was "to remove ruinous and self-defeating competition among the producers and permit all farmers to share the benefits of fluid milk profits according to the value of goods produced and services rendered." *Zuber v. Allen*, 396 U.S. 168, 180-81, 24 L. Ed. 2d 345, 90 S. Ct. 314 (1969). The AMAA, as amended, thus ensures that producers receive a uniform minimum price for their product, regardless of the end use to which it is put.

To accomplish this objective, the statute contains several mechanisms. First, it authorizes the Secretary to classify milk according to its end use and to establish minimum prices for each end-use classification. *See* 7 U.S.C. § 608c(5)(A). Second, it authorizes the Secretary to establish a uniform minimum price, termed the "blend price," based on a weighted average of all units of production of classes of milk sold to handlers associated with a marketing area. *See id.* Third, it requires handlers to pay producers the blend price, regardless of the end use to which the milk will be put. *See id.* § 608c(5)(B). Fourth, it authorizes a method for adjustments

in payments among handlers so that the final amount paid by each handler equals the value of the milk that handler has purchased, according to the minimum prices established. *See id.* § 608c(5)(C). Overall, the provisions attempt to promote orderly milk-marketing by maintaining minimum prices for producers and limiting the competitive effects of excess supply of Grade A milk.

Although it protects producers, the AMAA regulates handlers only. Pursuant to the AMAA directives, the Secretary has classified milk into the following classes of utilization: Class I milk includes fluid milk processed and bottled as a beverage; Class II milk includes soft milk products such as cottage cheese, sour cream, yogurt and ice cream; Class III includes hard cheese and cream cheese; and Class IV includes raw milk used for butter and dry milk powder. As directed by the AMAA, the Secretary has established a uniform pricing scheme for each of these classes of milk, as well as the average blend price.[5] Handlers governed by milk-marketing orders must pay producers this uniform blend price. The process of blending the prices of the different classes of milk on a monthly basis has come to be known as "pooling."

This uniform minimum pricing is intended to reduce the incentive producers would have to divert all fluid milk to Class I handlers and, literally, to flood that market. As the system operates, dairy producers within a marketing area receive the guaranteed uniform blend price for their milk,

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[5] The minimum prices are derived from regulatory formulas, the exact intricacies of which are not relevant here. Speaking generally, Class III and Class IV prices are derived by surveying the retail price of products such as cheese and butter and then factoring out certain manufacturing costs. Class I prices are computed by adding appropriate location differentials to Class III and IV prices. *See* 7 C.F.R. § 1000.50. Because of this pricing system, it is sometimes said that Class III and IV handlers receive "make allowances" based on their manufacturing costs.

regardless of the end use to which it is put. Because the uniform price is a weighted average, some handlers pay producers less for their milk than its market worth while other handlers pay more. Handlers who pay less to producers must make compensating payments into the producer settlement fund while handlers who pay more to producers may withdraw compensating payments from the fund.[6] Thus, within the regulatory scheme, handlers ultimately pay an amount equal to the utilization value of the milk they purchase.[7] This simplified example of the regulatory scheme by the district court for the District of Connecticut is helpful:

> Suppose Handler A purchases 100 units of Class I (fluid) milk from Producer A at the minimum value of $ 3.00 per unit. Assume further that Handler B purchases 100 units of Class II (soft milk products) milk from Producer B at the minimum value of $ 2.00 per unit, and that Handler C purchases 100 units of Class III (hard milk products) milk from Producer C at $ 1.00 per unit. Assuming that this constitutes the entire milk market for a regulatory district, during this period the total price paid for milk is $ 600.00, making the average price per unit of milk $ 2.00. Thus, under the regulatory scheme, Producers A, B,

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[6] Compensating payments to and from the settlement fund are actually determined by more complicated formulas that account for the total value of the handler's milk utilization as well as various credits and adjustments for transportation, assembly and plant location.

[7] Outside the regulatory system, economic realities may require some handlers to pay out-of-pocket premiums to producers, over and above the uniform blend price, in order to acquire their milk supply. These out-of-pocket premiums are not taken into consideration in the calculation of amounts owed to the settlement fund. *See* Manchester & Blayney, *supra* note 1, at 7 ("The prices set are minimums--market conditions can and often do lead to prices higher than the minimums.").

> and C all receive $ 200.00 for the milk they supplied, irrespective of the use to which it was put. However, Handler A must, in addition to the $ 200.00 that it must tender to Producer A, pay $ 100.00 into the settlement fund because the value of the milk it purchased exceeded the regulatory average price. Along the same vein, Handler C will receive $ 100.00 from the settlement fund because it will pay Producer C more than the milk it received was worth.

Stew Leonard's v. Glickman, 199 F.R.D. 48, 50 (D. Conn. 2001). The system of compensating payments into and out of the settlement fund thereby fulfills the AMAA requirement that "the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed." 7 U.S.C. § 608c(5)(C).

The country is divided into regional milk-marketing areas, which are governed by different marketing orders. Milk Marketing Order No. 30 governs the Upper Midwest marketing area, including portions of Illinois, Iowa, Michigan, Minnesota, North Dakota, South Dakota and Wisconsin. As a Wisconsin dairy that bottles milk for fluid consumption, Lamers is subject to regulation under Milk Marketing Order No. 30 as a Class I handler.

3. Price Inversions

As discussed, Class I prices are generally higher than Class III prices. Thus, the blend price usually falls above the Class III price, and Class III handlers typically are entitled to withdraw compensating payments from the settlement fund after paying producers the blend price. However, occasionally, periods of "price inversion" occur,[8] in which

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[8] The record in this case does not contain documentation of any periods of price inversion. However, throughout the litigation of this case, the USDA has addressed arguments regarding this occasional market occurrence. Furthermore, the Secretary of the USDA has issued statements

Class III prices exceed Class I prices. Price inversions occur in part because of differences in how and when classes of milk are priced. Class I milk prices are set prospectively while Class III and IV prices are set retrospectively, based on actual market prices during the pertinent time period. The USDA has explained:

> Class price inversion occurs when a markets's [sic] regulated price for milk used in manufacturing exceeds the Class I (fluid) milk price in a given month, and causes serious competitive inequities among dairy farmers and regulated handlers. Advanced pricing of Class I milk actually causes this situation when manufactured product prices are increasing rapidly.

Milk in the New England and Other Marketing Areas, Dep't of Agric., 64 Fed. Reg. 16,026, 16,102 (Apr. 2, 1999). Thus, price inversions occur during times of increased demand for manufactured products, primarily cheese.

Under Order No. 30, Class III handlers are not required to participate in the regulatory pooling. They may *either* join the pool or remain outside the minimum price structure. (This is true to some extent under other milk-marketing orders as well.) When Class III handlers withdraw from the pool, or "de-pool," they are not obligated to make compensating

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recognizing the disruption to the regulatory scheme caused by price inversion. *See* Milk in the New England and Other Marketing Areas, Dep't of Agric., 64 Fed. Reg. 16,026, 16,102 (Apr. 2, 1999) ("The first problem is readily evident in class price relationships during the latter part of 1998. The frequent occurrence of price inversions during that period indicates that some alteration to both the proposed and current methods of computing and announcing Class I prices may be necessary."). This court may take judicial notice of reports of administrative bodies, *see Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998), and it is therefore appropriate for this court to consider the reality of this occasional market occurrence.

payments to the settlement fund. During times of price inversion, then, Class III handlers have an incentive to withdraw from the pool. The USDA has explained the effect of price inversions on the dairy industry:

> In the past when price inversions have occurred, the industry has contended with them by taking a loss on the milk that had to be pooled because of commitments to the Class I market, and by choosing not to pool large volumes of milk that normally would have been associated with Federal milk order pools. When . . . [price inversions occur], it places fluid milk processors and dairy farmers or cooperatives who service the Class I market at a competitive disadvantage relative to those who service the manufacturing milk market.
>
> Milk used in Class I in Federal order markets must be pooled, but milk for manufacturing is pooled voluntarily and will not be pooled if the returns from manufacturing exceed the blend price of the marketwide pool. Thus, an inequitable situation has developed where milk for manufacturing is pooled only when associating it with a marketwide pool increases returns.

Id. When producers prefer to sell outside the pool due to higher manufacturing returns, Class I handlers may have to pay out-of-pocket premiums to attract their supply.

Thus, during times of price inversion, Class III handlers who de-pool may pay *less than* the Class III price. At the same time, Class I handlers inside the pool may be forced practically to pay *more than* the Class I price because of extra-regulatory premiums. In sum, the ability of Class III handlers to de-pool under Order No. 30 has negative economic consequences on Class I handlers who must remain within the pool.

B. Administrative and District Court Proceedings

In September 1999, Lamers stopped making required compensating payments into the settlement fund. Instead, Lamers filed an administrative petition with the USDA for exemption and/or modification of the provisions of Order No. 30. Lamers' petition alleged that Order No. 30 violated equal protection and contravened the AMAA by permitting "unfair trade practices." Lamers sought relief in the form of an order exempting it from pooling and from the obligation to make payments into the producer settlement fund. After an evidentiary hearing, an administrative law judge ("ALJ") sustained Order No. 30 and dismissed Lamers' petition. Lamers appealed to a USDA judicial officer. The judicial officer affirmed the ALJ. Lamers then brought an action in the district court, and the USDA counterclaimed for enforcement of the Secretary's decision.

The district court affirmed the Secretary. It determined that, as to Lamers' "unfair trade practices" claim, Lamers was attempting to sue under a non-existent right. As to Lamers' equal protection claim, the district court noted that the economic regulation was subject to rational basis scrutiny and concluded that the provisions of the regulatory scheme survived challenge under that standard. The district court subsequently ordered Lamers to pay $ 850,931.26 to the settlement fund. Lamers timely appeals.

II

DISCUSSION

A. Standard of Review

We review de novo the district court's grant of summary judgment. *See Indiana Family & Soc. Servs. Admin. v. Thompson*, 286 F.3d 476, 479 (7th Cir. 2002). All facts are drawn and all inferences viewed in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is appropriate when there is no genuine

issue of material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(C).

B. Equal Protection Claims

Lamers contends that the ability of Class III handlers to "de-pool," and its inability to do so, violates its right to equal protection of the law. When considering an equal protection claim, we first must ask whether the governmental action involves fundamental rights or targets a suspect class. *See, e.g., Eby-Brown Co., LLC v. Wisconsin Dep't of Agric.*, 295 F.3d 749, 754 (7th Cir. 2002). The distinction drawn by the Secretary between Class I and Class III handlers is based upon the end use to which these handlers put producer milk. It therefore clearly does not involve fundamental rights or target a suspect class and is merely an economic regulation. *See, e.g., id.* Such an economic classification "is accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993). The presumption applies not only to legislative actions, but also extends to administrative action. *See Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 185-86, 80 L. Ed. 138, 56 S. Ct. 159 (1935); *see also Steffan v. Perry*, 309 U.S. App. D.C. 281, 41 F.3d 677, 685 (D.C. Cir. 1994).

We therefore review the Secretary's difference in treatment to determine whether there is a conceivably rational relationship to a legitimate interest. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-79, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980). Practically, our review must be highly deferential:

> Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there

> is any reasonably conceivable state of facts that could provide a rational basis for the classification.

Beach Communications, 508 U.S. at 313. Governmental action only fails rational basis scrutiny if no sound reason for the action can be hypothesized. *See Northside Sanitary Landfill, Inc. v. City of Indianapolis*, 902 F.2d 521, 522 (7th Cir. 1990). Furthermore, a circumspect approach is especially appropriate in reviewing a challenge to the federal milk-marketing regime. *See Blair v. Freeman*, 125 U.S. App. D.C. 207, 370 F.2d 229, 232 (D.C. Cir. 1966) ("A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk-marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority."); *see also Zuber v. Allen*, 396 U.S. 168, 172, 24 L. Ed. 2d 345, 90 S. Ct. 314 (1969) (describing federal milk-marketing regime as a "labyrinth").

The USDA submits that the different treatment of Class I and Class III handlers is rationally based because of the purposes of regulation and the differing marketing conditions faced by fluid milk and cheese producers. We agree. The AMAA charges the Secretary of Agriculture with establishing and maintaining orderly marketing conditions so as to establish parity prices to farmers. *See* 7 U.S.C. § 602(1). The Secretary also is charged with establishing and maintaining orderly marketing conditions so as to ensure an orderly flow of supply and thereby prevent unreasonably fluctuating prices. *See id.* In order to achieve these legitimate marketing objectives, it is conceivably rational for the Secretary to treat Class I and Class III handlers differently with respect to pooling requirements.

In assessing the rationality of the Secretary's action, we must recall the relevant supply and demand characteristics of the market. As we have noted previously, the milk production industry is highly subject to seasonal fluctuations and

characterized by excess supply. That excess cannot be stored by producers; it must be marketed. Fluid milk products less easily are stored and transported than milk in other forms. They are more perishable and thus more subject to the fluctuations in daily demand. They are generally more highly valued. These circumstances affect the market for producer milk in critical ways and thus provide a rational basis for different pooling requirements among fluid milk and manufacturing handlers. To maintain stability in the milk market, the Secretary reasonably can require that milk used to produce fluid products be pooled while exempting other handlers from obligatory pooling. Indeed, the AMAA is premised on obligatory pooling of Class I milk, so that all producers may partake of its economic benefits. *See Zuber*, 396 U.S. at 180-81 ("The plain thrust of the federal statute was to remove ruinous and self-defeating competition among the producers and permit all farmers to share the benefits of fluid milk profits according to the value of goods produced and services rendered.").

Next, we must keep in mind that "pooling" essentially requires handlers to pay out a uniform minimum price for their supply and is required, in part, to maintain prices for producers. *See Alto Dairy v. Veneman*, 336 F.3d 560, 563 (7th Cir. 2003) (describing milk-pricing system as means of "redistributing wealth from consumers to producers of milk"). Class I handlers' end use typically represents the "cream of the crop," or the highest end use of Grade A producer milk, and so Class I purchases in the pool generally raise the blend price. Class III handlers, however, can use lower-standard Grade B milk in their products, and their purchases in the pool of higher-standard Grade A milk generally lower the blend price. It is relatively unsurprising, then, that the Secretary deems pooling by Class I handlers vital to the regulatory scheme but deems pooling by Class III handlers less essential, even though price inversions sometimes occur that disrupt normal marketing conditions.

Finally, we note that the history of the milk-marketing regime evidences primary concern with producer competition to make sales to the fluid milk market, not the manufacturing market. *See Zuber*, 396 U.S. at 180-81 (discussing AMAA purpose "to remove ruinous and self-defeating competition" among producers for sales in the fluid milk market); *see also Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 343, 81 L. Ed. 2d 270, 104 S. Ct. 2450 (1984) (discussing pooling requirements as means "to discourage destabilizing competition among producers for the more desirable fluid milk sales"); *United States v. Rock Royal Co-Op., Inc.*, 307 U.S. 533, 572, 83 L. Ed. 1446, 59 S. Ct. 993 (1939) (characterizing system of compensating payments under the settlement fund as "reasonably adapted" device "designed . . . to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened" the fluid milk market).[9] Given this driving concern over "ruinous and self-defeating" producer competition in the *fluid* milk market, *Zuber*, 396 U.S. at 180, it is not irrational for the Secretary to allow Class III de-pooling when market incentives are reversed and when sales to the manufacturing market become more attractive to producers.[10]

Lamers' challenge to the exemption of Class III handlers from pooling requirements is essentially one to the breadth of

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[9] *Cf. Alto Dairy v. Veneman*, 336 F.3d 560, 563 (7th Cir. 2003) (describing system of uniform pricing as "price discrimination" and noting that price discrimination increases profits, "thus counteracting the alleged (though almost certainly spurious) tendency of dairy farmers to destroy their business by competing overvigorously").

[10] This conclusion is not affected by the fact that price inversion itself may be perceived of as a "disorderly marketing situation." Milk in the New England and Other Marketing Areas, Dep't of Agric., 64 Fed. Reg. at 16,103.

the regulatory regime, i.e., the Secretary's failure to require Class III handlers to make compensating payments to the settlement fund when price inversions occur. However, it is well-established that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" without creating an equal protection violation. *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489, 99 L. Ed. 563, 75 S. Ct. 461 (1955). As such, "scope-of-coverage provisions" are "virtually unreviewable" because the government "must be allowed leeway to approach a perceived problem incrementally." *Beach Communications*, 508 U.S. at 316.

Similarly, equal protection does not require a governmental entity to "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 487, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970). Indeed, "mere underinclusiveness is not fatal to the validity of a law under the Fifth Amendment's guarantee of equal protection." *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002) (internal quotation and citation omitted); *see also Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 275, 84 L. Ed. 744, 60 S. Ct. 523 (1940) ("If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." (internal quotation and citation omitted)). Furthermore, "broad legislative classification must be judged by reference to characteristics typical of the affected classes." *Califano v. Jobst*, 434 U.S. 47, 55, 54 L. Ed. 2d 228, 98 S. Ct. 95 (1977).

In light of these governing principles, it is clear that Congress and the Secretary can regulate based upon typical milk-marketing conditions without thereby violating equal protection. Here, Congress and the Secretary have chosen to address the perceived problem of excess milk supply in the dairy industry by requiring Class I handlers to pool all their

supply while exempting other handlers from that same requirement, based on an assumption that Class I milk carries the highest market value. They have chosen, in effect, to address the usual situation while not addressing the abnormal, aberrant situation in which Class I milk does not carry the highest market price. Such incremental regulation does not violate equal protection.[11] *See Beach Communications*, 508 U.S. at 316; *see also Brazil-Breashears v. Bilandic*, 53 F.3d 789, 793 (7th Cir. 1995) (noting that the Illinois Supreme Court could act incrementally in restricting judicial employees' political activities, while exempting sitting judges from that restriction, "regardless of the probability that the government will ever address the rest of the problem").

We recognize that the Secretary's exemption of Class III handlers from pooling requirements effectively gives them a competitive advantage. They may participate in pooling when it is beneficial and withdraw when it is not. *See* Milk in the New England and Other Marketing Areas, Dep't of Agric., 64 Fed. Reg. at 16,102. Thus, the Class III pooling exemption is economically harmful to Lamers and other Class I handlers (as well as to producers committed to dealing with them) who must suffer the effects of Class III de-pooling. That harm, however, does not rise to the level of "invidious discrimination." *Williamson*, 348 U.S. at 489. Therefore, it is not a harm we can redress. *See Dandridge*, 397 U.S. at 485 (noting that "in the area of economics and social welfare," a governmental entity does not violate equal protection "merely because the classifications made by its laws are imperfect,"

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[11] We note further that what Lamers seeks is exemption from the pooling requirement. *See* R.1 at 7. Presumably, Lamers seeks to "de-pool" when the Class I price is higher than the blend price, which is most of the time. Lamers would thereby avoid compensating payments while taking advantage of the controlled market prices. To permit all Class I handlers to so act would vitiate the regulatory scheme devised by Congress.

and further stating, "if the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'" (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 55 L. Ed. 369, 31 S. Ct. 337 (1911))); *see also Heller v. Doe*, 509 U.S. 312, 319, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993) ("Rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" (quoting *Beach Communications*, 508 U.S. at 313)).

In cases involving economic and social regulation, so long as distinctions are conceivably rational, the recourse of a disadvantaged entity lies in the democratic process.[12] *See Beach Communications*, 508 U.S. at 314 ("'The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'" (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979) (footnote

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[12] By way of example, we note that, in 1999, the Secretary responded to industry complaints about price inversions by adjusting the Class I advanced pricing procedure in an attempt to limit the price-inversion phenomenon:

> The advanced pricing procedure provided in this final decision results in a Class I price that is based on a more recent manufacturing use price, thus reducing (but not eliminating) the time lag that contributes to class price inversion . . . .
>
> . . . .
>
> . . . Reducing the time period for which Class I pricing is advanced should reduce the potential [of price inversions] considerably, allowing Class I handlers to compete more effectively with manufacturing plants for fluid milk.

Milk in the New England and Other Marketing Areas, Dep't of Agric., 64 Fed. Reg. at 16,103.

omitted))); *see also Eby-Brown*, 295 F.3d at 754 (noting that improvident decisions "should be rectified through the democratic process and not the courts"). Lamers' equal protection claim based on the different pooling regulations governing Class I and Class III handlers must therefore fail.

We briefly address one additional issue under the rubric of equal protection analysis. Lamers submits that the failure of the regulations to account for certain out-of-pocket premiums it must pay to attract its supply violates its right to equal protection. Lamers' equal protection claim based on these premiums is fundamentally flawed because Lamers presents no *distinction* for this court to review. Specifically, Lamers has demonstrated no difference between it and any other handler as to the Secretary's treatment of these out-of-pocket premiums; the regulations simply do not take them into account.[13]

Even if we treat Lamers' complaint as somehow raising an equal protection claim, it fails. Although some handlers may be able to attract supply without paying such premiums, the Secretary's decision not to give any handler credit for such competitive costs does not thereby rise to an equal protection violation. *Cf. Eby-Brown*, 295 F.3d at 754-55 (determining that statute, which prohibited certain tobacco wholesalers from deducting "trade discounts" from costs but permitted

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[13] Lamers argues distinction based on the AMAA requirement that "the *total sums paid* by each handler shall equal the value of the milk purchased by him at the prices fixed." 7 U.S.C. § 608c(5)(C) (emphasis added). Because the Secretary does not account for out-of-pocket premiums, the calculation of the "total sums paid" does not accurately reflect the cost of some handlers' supplies. In the case of handlers not obligated by market realities to pay such premiums, the Secretary's "total sums paid" calculation more accurately reflects the cost of their supply. This practical effect results: Handlers paying out-of-pocket premiums owe larger compensating payments to the settlement fund than they would owe if the Secretary took supply premiums into account.

other wholesalers to deduct such costs, did not violate equal protection). It is conceivably rational that accounting for such extra-regulatory costs of competition would hinder the objectives of the regulatory scheme, in that it would reduce payments to the settlement fund. Furthermore, as we have discussed, the Secretary is permitted to engage in incremental regulation. *See, e.g., Williamson*, 348 U.S. at 489 ("The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." (citation omitted)). Thus, the Secretary's treatment of premiums survives scrutiny.

C. "Unfair Trade Practices" Claim

Lamers argues that four aspects of Order No. 30 constitute "unfair trade practices" prohibited by 7 U.S.C. § 608c(7)(A): (1) the ability of Class III handlers to de-pool; (2) the requirement that Class I handlers pay into the settlement fund when competing handlers dealing in both the fluid milk and the manufacturing markets may draw upon those funds; (3) the allowance of some manufacturing costs in the calculation of Class III and IV utilization prices; and (4) the ability of some processing plants to receive "kickbacks" for qualifying milk under the order.

Lamers' claim of "unfair trade practices" warrants only brief discussion, however, because, as the district court concluded, Lamers attempts to proceed under a non-existent statutory right. Under 7 U.S.C. § 608c(7)(A), the prohibition of "unfair methods of competition and unfair trade practices in the handling of" agricultural commodities is one of several "terms and conditions" that the Secretary may incorporate in orders issued under the AMAA.[14] It is not an independent statutory

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[14] The relevant text of 7 U.S.C. § 608c(7) provides:

In the case of the agricultural commodities and the products thereof specified . . . orders shall contain one or more of the

prohibition, and the Secretary is not required to include it in any order. Furthermore, the Secretary did not include the prohibition in Order No. 30. Therefore, Lamers lacks a statutory basis upon which to bring this claim.

Were it possible to construe Lamers' claim as an argument that the Secretary has advanced an unreasonable interpretation of the AMAA by enacting regulations that permit these allegedly "unfair trade practices," we first would be required to determine the appropriate level of deference that must be accorded the Secretary's interpretation of the AMAA, assuming that interpretation did not contravene statutory directives, and next would be required to determine whether the Secretary's interpretation represented a permissible construction under the appropriate level of deference.[15] *See*

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following terms and conditions:

> (A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.
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> . . .

[15] The USDA submits that Lamers must establish that its actions are "so arbitrary or patently inconsistent with congressional purposes as to exceed [the] statutory delegation of legislative authority." *See* Appellee's Br. at 33. It further submits that none of the complained-of practices are arbitrary or patently inconsistent with congressional purposes because each is related to the objective of stabilizing competition among farmers for sales in the fluid market: First, because Congress was concerned about competition among farmers competing in the fluid milk market and not in the cheese market, it is permissible for cheese processors to de-pool. Second, marketwide pooling expressly is authorized by 7 U.S.C. § 608c(5) and cannot be an unfair trade practice under that statute even though some handlers competing in the fluid market are entitled to draw payments from the fund in relation to their manufacturing purchases. Third, the manufacturing allowance is simply a factor used to compute the utilization price of Class III and Class IV raw milk. *See* 7 C.F.R. § 1000.50. Fourth, the arrangements between large processors and other plants enable additional plants to qualify for the order and constitute efficient systems of supply in the market. For these reasons, the USDA contends that the Secretary's decision to allow these

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). We need not decide this issue, however, because it is not possible to construe Lamers' arguments as reaching beyond a claim that the Secretary has failed to enforce an AMAA prohibition on "unfair trade practices."[16] *See* Appellant's Br. at 20 ("The USDA is not enforcing the specific prohibition contained in the AMAA as to unfair competition."); Appellant's Reply Br. at 14 ("The USDA is not administering the AMAA in such a manner as to avoid violating the specific prohibition contained in the AMAA as to unfair competition."). As noted, no such prohibition exists.

Conclusion

Lamers has not established an equal protection violation and cannot bring an "unfair trade practices" claim. For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

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practices withstands review. *See* Appellee's Br. at 32-35. We need not and do not decide these issues although we note that significant deference would be accorded the Secretary's interpretation of the statute it is charged with administering. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44, 81 L. Ed. 2d 694 (1984).

[16] We shall not make the argument for Lamers. *Cf. Franklin v. Gilmore*, 188 F.3d 877, 884 (7th Cir. 1999) (noting that plaintiff failed to make an argument excusing procedural default and declining to "make it for him"); *Stagman v. Ryan*, 176 F.3d 986, 995 n.2 (7th Cir. 1999) (declining to make admissibility arguments for plaintiff when on appeal plaintiff relied on evidence found inadmissible by the district court).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LAMERS DAIRY, INC.,

Plaintiff,

v.

UNITED STATES DEPARTMENT
OF AGRICULTURE

Defendant.

DECISION AND ORDER

This case is before me on plaintiff's challenge to a ruling by a judicial officer of the United States Department of Agriculture (the "Department" or "Secretary"). The ruling affirmed and adopted the decision of an administrative law judge ("ALJ") that required plaintiff to participate in marketwide milk pooling under Milk Market Order 30 and denied plaintiff's request for an exemption. Plaintiff Lamers Dairy ("Lamers") is a family-owned milk bottler located in Appleton, Wisconsin, and is deemed a "handler" of Class I fluid milk for purposes of the federal milk marketing regulations issued by the Department of Agriculture. In a petition filed with the Department in March, 2000, Lamers alleged that Milk Market Order 30 ("Order 30" or "Order") was not in accordance with the law. Specifically, Lamers asserted that the conditions resulting from the operation of the Order constituted an unfair trade practice prohibited by the Agricultural Marketing Agreement Act of 1937 ("AMAA"),

7 U.S.C. § 608c(7)(A), and that the Order denied Lamers equal protection of the laws, in violation of the Fifth Amendment to the United States Constitution[1]. The ALJ found for the Department, and the ALJ's finding was subsequently affirmed by the judicial officer for the Department of Agriculture. On September 5, 2001, plaintiff filed a Bill In Equity in this court challenging these rulings. Subsequently, the Department moved for summary judgment on the same issues. Following several extensions of time due to illness of plaintiff's counsel, the case is now fully briefed. For the reasons stated herein, I will grant. the Department's motion and affirm the decision of the judicial officer.

I. Background

The federal milk marketing orders constitute a labrynthine scheme designed to ensure that milk farmers, called producers, are not buffeted about by the vagaries of the uniquely volatile milk market. The purpose of each order (there are 11 orders in the United States, divided on a regional basis) is to regulate the milk market through minimum prices and the pooling of milk via a producer settlement fund. Under Order 30, which governs the upper Midwest, there are four classifications of milk, which are based on the end use made of that milk. Class I milk, commonly known as Grade A milk,

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[1] Lamers actually challenged these provisions under the Fourteenth Amendment, which governs states but not the United States Department of Agriculture. The analysis under the implicit equal protection clause of the Fifth Amendment is the same, however. Buckley v. Valeo, 424 U.S. 1, 93 (1976).

is bottled for drinking. Class II through IV are used for such things as powdered milk or cheese products.

The goal of this system is to stabilize the prices received by producers of milk, regardless of how their milk is ultimately used. (There is no difference in quality among the four classes.) Class I (fluid) milk generally commands the highest prices among the four classes. The AMAA aims to alleviate this price disparity by means of the settlement fund alluded to earlier. Magistrate Judge Smith of the District of Connecticut has aptly described the process:

> Suppose Handler A purchases 100 units of Class I (fluid) milk from Producer A at the minimum value of $3.00 per unit. Assume further that Handler B purchases 100 units of Class II (soft milk products) milk from Producer B at the minimum value of $2.00 per unit, and that Handler C purchases 100 units of Class III (hard milk products) milk from Producer C at $1 .00 per unit. Assuming that this constitutes the entire milk market for a regulatory district, during this period the total price paid for milk is $600.00, making the average price per unit of milk $2.00. Thus, under the regulatory scheme, Producers A, B, and C all receive $200.00 for the milk they supplied, irrespective of the use to which it was put. However, Handler A must, in addition to the $200.00 that it must tender to Producer A, pay $100.00 into the settlement fund because the value of the milk it purchased exceeded the regulatory average price. Along the same vein, Handler C will receive $100.00 from the settlement fund because it will pay Producer C more than the

> milk it received was worth. The pool achieves equality among producers, and uniformity in price paid by handlers.

Stew Leonard's v. Glickman, 199 F.R.D. 48, 50 (D. Conn. 2001).

To use the above example, Lamers is "Handler A," a handler (bottler) of Class I milk. As such, it must generally pay into the settlement fund to compensate the other handlers whose milk use is not quite so lucrative. In its petition to the Department of Agriculture, Lamers asserted that this system imposed an unfair trade practice and violated its right to equal protection of the laws. The unfairness and inequities were evidenced, Lamers claimed, in several ways. First, it argued that it was forced to subsidize large cheese manufacturers who were able to draw money out of the pool. Second, it argued that Class III milk handlers were unfairly allowed to "de-pool" at opportune moments, thus avoiding paying money into the settlement fund. Third, it argued that its "subsidization" of other handlers allowed those handlers an unfair competitive advantage, such that Lamers was forced to pay more to obtain milk from producers. Finally, it argued that Class III handlers have an unfair advantage over Class I handlers because they receive a "make allowance" in the calculation of the Class III price.

The ALJ found that the pooling provisions of Order 30 were not an unfair trade practice. The ALJ observed that both the prohibition of unfair trade practices as well as the Order's classification and pooling systems resulted from the same statute. Thus, he found that it would be illogical to find that the very system enacted by the AMAA would also violate the AMAA. (ALJ Op. at 5, "It must be presumed that

Congress did not intend to enact a statute with cross-purposes.") Moreover, milk producers are the primary beneficiaries of the AMAA, not milk handlers. (ALJ Op. at 5, 6.)

The ALJ also found that Lamers' equal protection rights were not implicated because Lamers had not shown how any similarly situated handlers were favored, nor had Lamers shown that there was no rational basis for the classification system.

The judicial officer affirmed the ALJ's decision on August 16, 2001. (See Docket #1.) On the issue of unfair trade practices, the judicial officer noted that marketwide pooling is specifically provided for in 7 U.S.C. § 608c(5)(B)(ii), and thus he agreed with the ALJ that it was "highly unlikely that Congress would, in the same statute, prohibit unfair trade practices in milk marketing orders and specifically provide that milk marketing orders may contain a provision which is an unfair trade practice." (Jud. Ofc. Op. at 35.)

As for equal protection, the officer found that Lamers had failed to identify any similarly situated handler in Order 30 who had been treated differently. Instead, Lamers referred only to some handlers in Missouri who were exempt from the order governing Missouri. (Jud. Ofc. Op. at 48.) Thus, the judicial officer ejected the equal protection claim and affirmed the ALJ's order.

Lamers now seeks reversal of these decisions and an exemption from market-wide pooling "for the reason that those provisions, as applied to Plaintiff, are not in accordance with the law." (Pl. Rep. Br. at 5.) The Department has counterclaimed, and now seeks summary judgment on that counterclaim for enforcement of the ALJ's order and judgment against the plaintiff for the amount of assessments

it alleges are currently due under the order, which totaled nearly $700,000 as of July 2002. (Kyburz Aff. ¶ 4, Docket #14, Ex. A.)

II. Standard of Review

The parties have substantial disagreements about the proper standard of review I should employ in this case. The Department, of course, suggests the very low "arbitrary and capricious" standard for evaluating the judicial officer's decision, while Lamers suggests a more stringent analysis. The AMAA provides that the Secretary of Agriculture's ruling may be challenged in the district courts, and the court may remand the proceedings to the Secretary if such ruling "is not in accordance with the law." 7 U.S.C. § 608c(1 5)(B). In determining whether the Secretary's ruling is in accordance with the law, I refer to the Administrative Procedure Act, which states that a court shall set aside agency actions and findings if such were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Here there is no genuine assertion that the judicial officer's decision was arbitrary or capricious. Instead, the challenge suggests that the decision was not in accordance with the law.

Caselaw provides some guidance on the standard of review. Findings of fact are accorded deference if they are supported by substantial evidence in the record. *Mattes v. U.S.*, 721 F.2d 1125, 1128-299 (7th Cir. 1983) ("Our review of the factual findings made by the Secretary of Agriculture is narrow.") Legal conclusions are reviewed de novo, however, although "within the de novo framework we give a certain amount of deference to an agency's reasonable) instruction of a statute it is charged with administering". *Maka v. U.S. I.N.S.*, 04 F.2d 1351, 1355 (9th Cir. 1990),

quoting *Mester Mfg. Co. v. INS*, 879 F.2d 61, 565 (9th Cir.1989). Thus, "a reviewing court ... will temper that general mandate of de novo review by according some deference to the agency's legal interpretations." Director, *Office of Workers' Compensation Programs, U.S. Dept. Labor v. Ball*, 826 F.2d 603, 604 (7th Cir. 1987).

Here, where I am reviewing the Secretary's interpretation of its own regulations, the level of deference is higher, as a certain amount of expertise is resumed. In other words, I must defer to the Secretary's interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)). Further, as the Eighth Circuit is noted, several considerations in this case add to the already "considerable eight [that] should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Minnesota Milk Producers Assn v. Glickman*, 153 F.3d 632, 642 (8th Cir. 1998), quoting *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)(footnote omitted).

Among these considerations, as the Supreme Court itself has noted, are intricacy of "the labyrinth of the federal milk marketing regulation provisions."*Zuber v. Allen*, 396 U.S. 168, 172 (1969). Thus, "[a] court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority." *Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966).

The Secretary has delegated review power to the judicial officer pursuant 7 C.F.R. § 900.65-71. Thus, I will not lightly reverse the judicial officer's opinion and will give substantial deference to his legal interpretation of the AMAA and the Department's regulations. I will not set aside his other findings if they are supported by substantial evidence.[2] 5 U.S.C. § 706(2)(E).

III. Alleged Violations of Equal Protection and Unfair Trade Practices

Lamers claims that various alleged injustices and discrepancies inherent in the pooling system violate the equal protection guarantees of the Constitution and violate the AMAA's prohibition of unfair trade practices. Specifically, Lamers cites four instances of the Order's operation that it claims are illegal. First, as a Class I handler, Lamers must pay money into the settlement fund to compensate those handlers who deal in other types of dairy products. Lamers' complaint is that it is effectively "subsidizing" its competitors who are handlers both of the Class I variety as well as being Class III or IV handlers. Thus, these competitors are able to withdraw from the fund and they therefore have more money with which to pay milk producers. The upshot is that Lamers must then itself pay producers more in order to compete with the other handlers.

Second, it alleges that Class I handlers are unfairly treated because during some rare periods the price for Class

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[2] The level of deference is much less, of course, when reviewing the constitutional impact of such regulations. In any event, my conclusions in this case would survive even were I to apply a strict de novo analysis to the judicial officer's opinion.

III milk actually exceeds the Class I price. In these situations, Class III handlers are allowed to "de-pool" their milk and thereby void having to pay into the settlement fund.

Third, Lamers suggests that some manufacturers are allowed to receive "kickbacks" under the Order. According to Lamers' description, large processing plants can qualify the milk of other manufacturers on the Order. For this, they charge a premium to the manufacturers, but the manufacturers are still better off because they become eligible (by virtue of qualifying on the Order) for payments from the settlement fund. This enables them to compete for producers "in direct competition with Lamers under circumstances in which Lamers cannot compete on equal basis." (PI. Br. at 9.)

Finally, Lamers claims that Class III and IV handlers are allowed a "make allowance" under the Order which allows them to recover their costs of manufacturing. Lamers, which is exclusively a Class I handler, does not get to recover its costs, and thus is subject to a more competitive market than it would like.

IV. The Secretary's Decision

As noted above, the Department's judicial officer affirmed the decision of e ALJ and adopted that opinion with only minor modifications. I will address his decision on both unfair trade practice and equal protection grounds.

1. Unfair Trade Practices

Prior to obtaining counsel in this case, Mr. Richard Lamers, the proprietor of Lamers Dairy, appeared in a pro se capacity before the Department. In those proceedings before the agency, Mr. Lamers claimed that the AMAA prohibited fair trade practices pursuant to 7 U.S.C. § 608c(7)(A). Lamers has retained counsel for its current appeal in district court, and his counsel has also argued that the AMAA

prohibits "unfair methods of competition and unfair trade practices". PI. Br. at 4.)

The Department has not questioned this premise, and neither the ALJ nor the judicial officer examined the statutory foundation on which Mr. Lamers based original claim. As noted above, both the ALJ and the judicial officer concluded at Lamer's argument failed as a matter of law since the same act that prohibits fair trade practices, the AMAA, also expressly authorizes the classification and pooling systems set forth in the Order. *See* 7 U.S.C. § 608c(5)(B)(ii). It makes little sense to suggest that in prohibiting unfair trade practices, Congress intended prohibit marketwide pooling when it expressly authorized the implementation of which a system in its effort to stabilize prices paid to producers. I agree with the conclusion of the ALJ and the judicial officer that the implementation of market-wide pooling does not constitute an unfair trade practice as that term is used in the AMAA. But I also see a more fundamental problem with petitioner's unfair trade practice claim.

> The statute section relied on by Lamers reads:
>
> (7) Terms common to all orders
>
> In the case of the agricultural commodities and the products thereof specified in subsection (2) [including milk] of this section orders shall contain one or more of the following terms and conditions:
>
> (A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.
>
> (B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at

prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

...

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

7 U.S.C. § 608c(7)(italics added).

Notwithstanding the title of this section, the plain meaning of its language is that the orders issued by the

Secretary are to contain "one or more" of the terms and conditions listed thereunder, only one of which is the prohibition of unfair trade practices. Thus, on its own, § 608c(7) cannot in any way be read to prohibit "unfair methods of competition and unfair trade practices" as Lamers suggests. (Pl. Br. at 4.) Only if the Secretary had included subsection (A) in the Order would Lamers have such a claim. The fatal problem for Lamers is that Order 30 does not contain this condition, as plaintiff has now conceded via a letter to the court dated March 6, 2003.[3] See 7 C.F.R. § § 1030.1 et seq. Perhaps this is why § 608c(7)(A) has never been cited in any published opinion, much less for the proposition that it creates a substantive standard for competition in agricultural products. Indeed, it is remarkable that this issue has made it so far, as Lamers is suing under.what appears to be a non-existent statutory right. Thus, although the Secretary addressed this issue differently, I cannot say his conclusion was "not in accordance with the law" because the law simply does not prohibit the practices that plaintiff was suggesting during the administrative review process. 7 U.S.C. § 608015)(B).

2. Equal Protection

Lamers also argues that the practices cited above violate its right to equal protection of the laws. Equal protection means that all similarly situated persons must be treated alike. *Illinois Health Care Assn v. Illinois Dept. of Public Health*, 879 F.2d 286, 288 (7th Cir. 1989). Usually the claim involves a protected fundamental right or a suspect

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[3] I held a telephonic scheduling conference on February 21, during which I invited the parties to submit letter briefs on this issue.

classification such as race, and laws discriminating on such a basis are subject to strict judicial scrutiny. However, like other forms of economic and social legislation, the Milk Marketing Orders do not classify by race, alienage, or national origin. Thus, analysis of the Order proceeds under the relatively forgiving rationality standard, and the Order will therefore survive an equal protection attack if it bears a rational relationship to a permissible state objective. The Constitution presumes that, absent some reason to infer congressional ill will, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 133 (3d Cir. 2002).

Lamers' arguments do not fit within any kind of logical equal protection analysis. It must be remembered that its goal in this case is to be exempted from the Order's pooling requirements. That is, far from seeking to remedy some illegal disparity, it seeks to *create* a disparity by obtaining treatment different from other handlers. What it seeks, ultimately, is *unequal* protection of the laws. Reading between the lines of Lamers' equal protection arguments, one gets the inescapable sense that its real complaint is that it was *not* treated differently from other handlers. Indeed, this is precisely the argument the Department makes in support of its motion for summary judgment on its counterclaim for a declaration thatLamers is subject to Milk Marketing Order 30 and an award of the amounts owed thereunder. Thus, it is difficult to see how treating Lamers differently than all other handlers could remedy its claim of unequal treatment.

Lamers claims that as a small handler, it is not "on a level playing field" with other handlers. (Pl. Br. at 12.) In essence, it is asking that it be exempted from the Order

because its particular circumstances make it unfair to require it to participate. If true, this situation evokes some sympathy. But the fact that there may be disadvantages under the order to small handlers does not show an equal protection violation. In *United States v. Mills*, 315 F.2d 828 (4th Cir. 1963), the Fourth Circuit rejected a similar challenge stating:

> After all, the Secretary must look at the area with a wide and comprehensive perspective. He has before him the entire output of milk in the area, and he must search for the best ways and means for its disposition. Aware of the annual consumption and distribution of fluid milk, he must arrange to channel the residue into outlets the most advantageous to the producer and consumer. He fashions his order accordingly. Of course, there may be some resultant damage to a handler or producer in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order. The constitutionality of the Act is no longer questionable. United States v. Rock Royal Co-op., supra, 307 U.S. 533, 568-581, 59 S. Ct. 993, 83 LED. 1446. Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot 'produce complete equality, for the variables are too numerous,' he 'fulfills his role when he makes a reasoned' Order. Mitchell v. Budd, 350 U.S. 473, 480, 76 S. Ct. 527, 532-532, 100 LED. 565 (1956).

315 F.2d at 838.

Lamers' equal protection claim fails on other grounds as well. For instance, Lamers has failed to identify any similarly situated handlers who have been treated more favorably. Lamers concedes repeatedly that it is a small operation and that it is the last family-owned bottler of milk in Wisconsin. Specifically, "Plaintiff, unlike many other Class I handlers subject to the Order, is not also a Class III or IV handler." (Pl. Reply Br. at 17.) Thus, Lamers "is unable to participate in the [Order] due to the size of its operations." (PI. Reply Br. at 18.) Indeed, Lamers goes so far as to state that "it is imperative to note that Plaintiff is unlike most Class I handlers subject to the Order." (Pl. Reply Br. at 9.) The crux of its complaint is that it "is treated unequally under the Order as compared to many of its Class I competitors which are both Class I or II and Class III and IV handlers." (Pl. Reply Br. at 13.)

As noted above, an equal protection claim requires a plaintiff to show that the government is treating unequally persons who are prima facie identical in all relevant respects. *Indiana State Teachers Assn v. Board of School Commissioners of the City of Indianapolis*, 101 F.3d 1179, 1 181 (7th Cir. 1996). Lamers claims that, "due to the size and scope of its operations," it is treated less favorably than other Class I handlers. (Pl. Reply Br. at 12.) Lamers, by conceding (indeed emphasizing) that it is quite different from other handlers, has argued itself out of this claim. To succeed on its equal protection claim, it would have had to argue that similarly situated small handlers were treated more favorably or granted exemptions while Lamers was not. *See Chavez v. Illinois State Police*, 251 F.3d 612, 637 (7th Cir. 2001)("The relevant inquiry is whether a similarly situated individual was treated differently than the plaintiff".) Accordingly, because Lamers cannot point to any unequal treatment between

similarly situated handlers, its equal protection claim must fail.

Finally, even if Lamers could demonstrate how it was treated differently than Dther similarly situated handlers, its equal protection claim would not survive a rational basis review of the Order scheme. Regulatory classifications are presumed to be valid, and the burden is on the plaintiff to "negative every conceivable basis which might support" the classification. *Heller v. Doe*, 509 U.S. 312, 320 (1993). As the ALJ noted, the Secretary of Agriculture has stated that the classification scheme ensures that all *producers* supplying handlers in a marketing area receive the same uniform price for their milk. (ALJ Op. at 7.) Thus, the legislature's rational purpose for enacting the classified milk system, as many courts have observed, is to raise producer prices by means of the producer settlement fund. *See United Dairymen of Arizona v. Veneman*, 279 F.3d 1160, 1162 (9th Cir. 2002). Lamers has not "negativel[d] every conceivable basis" for the operation of the Order. Thus, even if Lamers were similarly situated to all other Class I handlers, which it has admitted is not the case, the rational basis of Congress is sufficient to justify the Order's operation. Accordingly, I must affirm the Secretary's decision and deny Lamers' Bill of Equity.

V. Defendant's Motion for Summary Judgment

Under Rule 56, summary judgment is appropriate when the movant shows that there is "no genuine issue as to any material fact" and that it "is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). As the Fifth Circuit has noted, summary judgment is "particularly appropriate in cases in which the court is asked to review or enforce a decision of a federal administrative agency," because "(judicial review

has the function of determining whether the administrative action is consistent with the law--that and no more." *Girling Health Care, Inc. v. Shalala*, 85 F.3d 211, 215 (5th Cir. 1996)(quoting 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2733).

Accordingly, for the reasons stated above, the government is entitled to judgment as a matter of law. Plaintiff has failed to demonstrate that the Order is contrary to law or that it's [sic] application results in a violation of plaintiff's constitutional rights.

ORDER

IT IS THEREFORE ORDERED that the decision of the Judicial Officer is affirmed and Lamer's Bill of Equity is **DENIED**.

IT IS FURTHER ORDERED that the Department's motion for summary judgment is **GRANTED**.

IT IS FURTHER ORDERED that Lamers is subject to the regulatory provisions of Milk Order 30; that Lamers pay the assessments due thereunder, together with interest and late charges in the amount of $686,226.31 as of July 16, 2002, to which may be added such additional amounts as have since become due and owing, subject to proof thereof being submitted within thirty days hereof; and that Lamers cease and desist violating Milk Order 30.

Dated this 11th day of March, 2003.

/s/

William C. Griesbach
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
Eastern District of Wisconsin

LAMERS DAIRY, INC.,
Plaintiff,

AMENDED JUDGMENT IN CIVIL CASE

v. Case No. 01-C-890

UNITED STATES DEPARTMENT
OF AGRICULTURE
Defendant.

Decision by Court. This action came before the Court for consideration.

IT IS THEREFORE ORDERED that the decision of the Judicial Officer is affirmed and Lamer's Bill of Equity is **DENIED**.

IT IS FURTHER ORDERED that the Department's motion for summary judgment is **GRANTED**.

IT IS FURTHER ORDERED that Lamers is subject to the regulatory provisions of Milk Order 30; that Lamers pay the assessments due thereunder, together with interest and late charges in the amount of $850,931.26, which amount having become due and owing as of March 21, 2003; and that Lamers cease and desist violating Milk Order 30.

Approved: /s/
William C. Griesbach
United States District Judge

Dated this 9th day of May 2003.

SOFRON B. NEDILSKY
Clerk
/s/
(By) Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
Eastern District of Wisconsin

LAMERS DAIRY, INC.,
Plaintiff,

JUDGMENT IN A CIVIL CASE

v. Case No. 01-C-890

UNITED STATES DEPARTMENT
OF AGRICULTURE
Defendant.

Decision by Court. This action came before the Court for consideration.

IT IS THEREFORE ORDERED that the decision of the Judicial Officer is affirmed and Lamer's Bill of Equity is **DENIED**.

IT IS FURTHER ORDERED that the Department's motion for summary judgment is **GRANTED**.

IT IS FURTHER ORDERED that Lamers is subject to the regulatory provisions of Milk Order 30; that Lamers pay the assessments due thereunder, together with interest and late charges in the amount of $686,226.31 as of July 16, 2002, to which may be added such additional amounts as have since become due and owing, subject to proof thereof being submitted within thirty days hereof; and that Lamers cease and desist violating Milk Order 30.

Approved: /s/
William C. Griesbach
United States District Judge

Dated this 11th day of March 2003.

SOFRON B. NEDILSKY

Clerk

/s/

(By) Deputy Clerk

(2)

Supreme Court, U.S.
FILED
FEB 4 - 2005
OFFICE OF THE CLERK

No. 04-766

In the Supreme Court of the United States

LAMERS DAIRY, INC., PETITIONER

v.

DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

BARBARA C. BIDDLE
JEFFREY CLAIR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, authorizes the Secretary of Agriculture to establish a minimum price that "handlers" that purchase and process raw milk must pay to dairy farmers. Under Milk Marketing Order No. 30, which governs milk handlers in the upper Midwest, handlers purchasing milk for use in manufactured products, such as cheese, may participate or withdraw from the regulatory scheme voluntarily, but handlers purchasing milk for fluid consumption are required to comply with the minimum price regulations. The questions presented are:

1. Whether the Secretary has authority under 7 U.S.C. 608c(5) to permit handlers to withdraw from the uniform pricing scheme.

2. Whether Milk Marketing Order No. 30's distinction between fluid milk handlers and handlers of manufactured dairy products is rationally related to a legitimate government objective, and thus consistent with the equal protection component of the Due Process Clause of the Fifth Amendment.

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In the Supreme Court of the United States

No. 04-766

LAMERS DAIRY, INC., PETITIONER

v.

DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21)[1] is reported at 379 F.3d 466. The opinion of the district court (Pet. App. B1-B17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2004. The petition for a writ of certiorari was filed on November 11, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.*, authorizes the Secretary of Agriculture to issue orders establishing

[1] Appendices A, C, and D are not numbered. The citations herein are based on the actual pagination.

minimum uniform prices for raw milk. Such orders prevent the destabilization in the milk market that would occur if dairy farmers flooded the market for fluid milk in an attempt to capture the market price associated with fluid milk products, which is typically higher than the market price for milk that is used in manufactured products, like yogurt, cheese, or butter. To this end, the AMAA authorizes the Secretary of Agriculture to establish a minimum price that milk "handlers," purchasers of raw milk that prepare fluid or manufactured milk products for resale to consumers or intermediaries, must pay to milk producers regardless of the milk's end use. See generally *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984); *Zuber* v. *Allen*, 396 U.S. 168, 172-174 (1969).

Specifically, the AMAA requires the Secretary to classify milk according to its end use—raw milk for fluid consumption is "Class I milk," and raw milk for manufactured products is classified as "Class II," "Class III," or "Class IV" milk, depending on the milk's precise end use, see 7 C.F.R. 1000.40—and establish a uniform minimum price for each class of milk. 7 U.S.C. 608c(5)(A). In addition, the Secretary may establish a minimum regional price that handlers must pay for milk, regardless of its class, in specified marketing areas. 7 U.S.C. 608c(5)(B). This minimum regional price, called a "blend price," is a weighted average of the value of the various classes of milk sold in the marketing area. *Ibid.*; *Lehigh Valley Coop. Farmers, Inc.* v. *United States*, 370 U.S. 76, 80 (1962). Finally, the AMAA authorizes the Secretary to pool milk revenues in order to redistribute those revenues equitably. 7 U.S.C. 608c(5)(C).

The Secretary effectively pools and redistributes milk revenues through regional producer settlement

funds. See 7 C.F.R. 1000.70; *Lehigh Valley*, 370 U.S. at 81. When a handler pays a blend price for raw milk that is less than the minimum class price established by the Secretary, which usually occurs when the handler is purchasing Class I milk, the handler must pay into the fund the difference between the blend price and the minimum. 7 C.F.R. 1030.71. Conversely, when a handler pays a blend price that exceeds the minimum class price, which usually occurs when the handler purchases Class II, III, or IV milk, the handler may draw a payment from the settlement fund in the amount of the difference.[2] See 7 C.F.R. 1030.72.

2. Pursuant to the AMAA, the Secretary has issued Milk Marketing Order No. 30 (Order No. 30) to govern milk handlers in the upper Midwest. 7 C.F.R. Pt. 1030. Order No. 30 requires handlers purchasing raw milk for fluid consumption (Class I handlers) to abide by the regulatory minimum pricing structure and revenue pooling. The participation of handlers purchasing milk for use in hard cheese and cream cheese (Class III handlers), however, is entirely voluntary, and they may "de-pool." Pet. App. A8-A9.

Class III handlers have an incentive to de-pool when market conditions are such that they would be required to pay *into* the settlement fund if they were to participate in the regulatory scheme—that is, in the rare instances in which the minimum price of Class III milk exceeds the price of Class I milk, which occurs, for

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[2] In practice, a handler's obligation to the producer settlement fund is more complex, determined by a complicated formula that takes into account the total value of the handler's milk usage and various credits and adjustments for transportation, assembly, and plant location. 7 C.F.R. 1030.71, 1030.55, 1030.75.

example, during times of rapidly increasing demand for cheese. Pet. App. A7-A8. When this phenomenon (known as "price inversion") occurs, Class I handlers may have to pay an out-of-pocket premium to attract supplies of raw milk. *Id.* at A9. Thus, the ability of Class III handlers to de-pool under Order No. 30 can have negative economic consequences on Class I handlers that must operate within the pool during times of price inversion. *Ibid.*

3. Petitioner is a Wisconsin corporation that bottles fluid milk for distribution and sale to wholesale and retail customers in Wisconsin. As such, petitioner is a Class I milk handler that is subject to, and required to abide by, Order No. 30. Pet. App. B1.

In September 1999, petitioner ceased making payments into the producer settlement fund and filed an administrative petition for exemption from, or modification of, Order No. 30. Petitioner argued that Order No. 30 violated equal protection and allowed violations of a provision in the AMAA purportedly prohibiting unfair trade practices, see 7 U.S.C. 608c(7)(A), by distinguishing between Class I and Class III handlers. Pet. App. A10. After an evidentiary hearing, an administrative law judge sustained Order No. 30 and dismissed the petition. *Ibid.* A United States Department of Agriculture (USDA) judicial officer affirmed the ALJ's decision. *Ibid.*

4. The district court affirmed the Secretary's decision. Pet. App. B1-B17. The court rejected petitioner's constitutional claim, observing that petitioner could not "point to any unequal treatment between similarly situated handlers" caused by the marketing order. *Id.* at B15-B17. Moreover, "even if [petitioner] could demonstrate how it was treated differently," the court

observed, "its equal protection claim would not survive a rational basis review." *Id.* at B16. The court explained that "the Secretary of Agriculture has stated that the classification scheme ensures that all *producers* supplying handlers in a marketing area receive the same uniform price," the "rational purpose" of which "is to raise producer prices by means of the producer settlement fund." *Ibid.* The court also rejected petitioner's claim that the marketing order results in an unfair trade practice prohibited by 7 U.S.C. 608c(7)(A), reasoning that the provision did not create a "statutory right" to fair trade practices but simply listed terms that the Secretary could include in a pricing order. Pet. App. B12.

5. The court of appeals affirmed. Pet. App. A1-A21. With respect to petitioner's equal protection claim, the court reasoned that Order No. 30 is subject to rational basis review because any distinction between Class I and Class III milk handlers would not "involve[] fundamental rights or target[] a suspect class" but would constitute "mere[] economic regulation." *Id.* at A11. The court further observed that the Secretary had a rational basis for "requir[ing] that milk used to produce fluid products be pooled while exempting other handlers from obligatory pooling," because "the AMAA is premised on obligatory pooling of Class I milk, so that all producers may partake of its economic benefits." *Id.* at A13. The equal protection component of the Due Process Clause did not require the government, moreover, to attack every aspect of destabilization in the milk market. Thus, the fact that Congress and the Secretary had chosen "to address the usual situation" in the milk industry, "while not addressing the abnormal, aberrant situation in which Class I milk does not carry the

highest market price," did not violate equal protection. *Id.* at A16.

The court rejected petitioner's contention that Order No. 30 resulted in an "unfair trade practice" prohibited by 7 U.S.C. 608c(7)(A) for the same reason identified by the district court: the argument relied on "a non-existent statutory right." Pet. App. A19. Section 608c(7)(A), the court explained, "is not an independent statutory prohibition, and the Secretary is not required to include it in any order." *Id.* at A19-A20. The court noted that "[w]ere it possible to construe Lamers' claim as an argument that the Secretary has advanced an unreasonable interpretation of the AMAA" in Order No. 30, it would have been required to determine whether to defer to the Secretary's interpretation of the act. *Id.* at A20. But the court did not decide that issue, because it was "not possible to construe [petitioner's] arguments as reaching beyond a claim that the Secretary has failed to enforce an AMAA prohibition on 'unfair trade practices'." *Id.* at A21.

ARGUMENT

Petitioner largely contends that the court of appeals erred by failing to hold that the Secretary lacks authority under the AMAA to permit Class III handlers to opt out of the regulatory pricing scheme. Pet. 7-16. Petitioner also argues that Order No. 30's distinction between different types of milk handlers violates the equal protection component of the Due Process Clause. Pet. 13. Petitioner failed, however, to advance in the courts below a claim challenging the Secretary's authority to issue Order No. 30. In addition, the court of appeals correctly applied this Court's equal protection precedents to reject petitioner's equal protection claim,

and no other court of appeals has rendered a conflicting decision. Further review is therefore not warranted.

1. a. Petitioner advanced no claim in the court of appeals that the Secretary lacked statutory authority to issue Order No. 30. Nor did it advance any claim that Order No. 30 is an unreasonable interpretation of the AMAA under *Chevron* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Rather, petitioner relied on its interpretation of the AMAA to advance its equal protection argument. For example, petitioner argued that the court of appeals should not limit its equal protection inquiry to whether petitioner suffered disparate treatment "as a Class I handler vis-a-vis other Class I handlers," because the AMAA "deals with *all* handlers." Pet. C.A. Br. 10.[3] Although petitioner argued that Order No. 30 fails to protect its purported statutory right to be free from unfair trade practices, the court of appeals expressly declined to decide whether Order No. 30 rests on an unreasonable interpretation of the AMAA, because petitioner had failed to argue the point. Pet. App. A20-A21. It simply was "not possible," in the court of appeals' view, "to construe [petitioner's] arguments as reaching beyond a claim that the Secretary has failed to enforce an AMAA prohibition on 'unfair trade practices.'" *Id.* at A21.

Accordingly, whether the Secretary is authorized under the AMAA to permit de-pooling by certain

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[3] Petitioner also relied on the purpose of the AMAA in arguing that the failure of Order No. 30 "to account for certain out-of-pocket premiums" that it was required to pay to milk suppliers "violates its right to equal protection." Pet. App. A18. The court of appeals correctly rejected this equal protection claim on the ground that it involved "no *distinction* for this court to review" (*ibid.*), and petitioner does not renew that argument in this Court.

handlers is not a question preserved for this Court's review. See *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

b. In any event, petitioner's argument lacks merit. The fundamental purpose of the AMAA is to prevent milk producers from flooding the fluid milk market by establishing uniform prices that handlers must pay to milk producers regardless of the milk's end use. *Community Nutrition Inst.*, 467 U.S. at 341-342; *Zuber*, 396 U.S. at 172-176. Permitting handlers that produce cheese to participate voluntarily in this uniform pricing system, as milk marketing orders have long provided, does not conflict with this statutory goal. As the court of appeals observed, such an exception would not cause excess supply in the *fluid* milk market. Pet. App. A15-A16. Moreover, contrary to petitioner's claim (Pet. 13-14), the AMAA does not require that all regulated handlers pay the *same* price for milk; it requires only that handlers pay to producers at least a uniform *minimum* price. See 7 U.S.C. 608c(5)(B).

2. a. With respect to the primary legal issue decided below—whether Order No. 30 violates the equal protection component of the Due Process Clause by distinguishing between Class I and Class III milk handlers—there is no conflict among the courts of appeals that would warrant this Court's review. Indeed, no other court of appeals has considered the issue. Cf. *United Dairymen* v. *Veneman*, 279 F.3d 1160, 1164, 1167 (9th Cir. 2002) (holding that district court lacked subject matter jurisdiction, because plaintiffs lacked standing, to consider similar equal protection challenge

to exclusion of producer-handlers from marketing order).

b. The court of appeals' conclusion that petitioner's equal protection challenge lacks merit is, in any event, consistent with this Court's precedents. This Court has made clear that, unless it implicates a suspect classification or fundamental right, economic legislation is reviewed deferentially when challenged on equal protection grounds; the legislation must be upheld if there is any rational basis for the classification employed therein. *Heller* v. *Doe*, 509 U.S. 312, 319-321 (1993); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *New Orleans* v. *Dukes*, 427 U.S. 297, 303-304 (1976).

As the court of appeals pointed out (Pet. App. A12-A13), handlers of manufactured milk products and handlers of fluid milk products are not similarly situated, because of differences surrounding the production of fluid milk and manufactured milk products. Cheese, for example, is less seasonal and more easily stored and transported than fluid milk. *Ibid.* The court of appeals' conclusion that these differences provide a rational basis for regulating handlers differently is consistent with this Court's equal protection jurisprudence. See *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."). In addition, the court of appeals' conclusion (Pet. App. A15-A16) that equal protection under the Constitution does not compel Congress or the Secretary to address every problem in the milk market simultaneously is consistent with this Court's conclusion that Congress is free to proceed "one step at a time" in addressing complex

economic problems. *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483 (1955); *Dandridge* v. *Williams*, 397 U.S. 471, 487 (1970). Accordingly, the court of appeals' decision is correct and consistent with this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

BARBARA C. BIDDLE
JEFFREY CLAIR
Attorneys

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No. 04-766

In the

Supreme Court of the United States

LAMERS DAIRY, INC.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR REHEARING

ROBERT N. DUIMSTRA
Counsel of Record
MENN LAW FIRM, LTD.
222 N. ONEIDA STREET
APPLETON, WI 54911
(920) 731-6631

Attorneys for Petitioner

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INTRODUCTION

Pursuant to Rule 44, the petitioner, Lamers Dairy, Inc. ("Lamers"), respectfully requests this Court to grant its petition for rehearing on its petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The issues involved in this case go to the heart of the milk order system, which was established by Congress "principally for the economic protection of producer and consumer." U.S. v. Mills, 315 F.2d 828, 837 (4th Cir. 1963).

However, the respondent, United States Department of Agriculture (the "USDA"), is not administering the system in a manner which can or will accomplish these objectives. Consequently, intervention by this Court is necessary to safeguard the economic interests of producers and consumers by eliminating the discriminatory treatment and unfair trade practices involving handlers like Lamers.

REASONS FOR GRANTING THIS PETITION:

I. The USDA Admits To Disparate Treatment Of Milk Handlers Under The AMAA.

In its brief in opposition to the petition of Lamers for a writ of certiorari, the USDA admits that the Secretary of Agriculture's administration of the Agricultural Marketing Agreement Act of 1937, as amended (the "AMAA"), is not applied on a market-wide basis or to all handlers as required under 7 U.S.C. §608c (5)(B)(ii) and §608c (5)(A). (Resp. Br., pp. 3-4,

8-9). Nevertheless, the USDA seeks to legitimize its disparate treatment of handlers of milk under the AMAA and the Upper Midwest's Milk Marketing Order No. 30 by distinguishing fluid milk handlers from other handlers. By doing so, the USDA is inserting words into the AMAA which Congress did not choose to include.[1]

In fact, 7 U.S.C. §608c (5) specifically applies to "milk and its products" (emphasis added), thereby deliberately encompassing butter, cheese, dry milk powder, and other Class II, III, and IV uses in addition to fluid milk for consumption. Likewise, the term "handler" is broadly defined as "any person who operates a pool plant or a non-pool plant," 7 C.F.R. §1000.9, and is never restricted to merely mean a "fluid milk handler." Thus, under the established statutory and regulatory milk system, Lamers, as a "handler", is similarly situated to plant operator "handlers" such as cheese processors and manufacturers of other milk products, and should be granted similar treatment - a playing field level with

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[1] The USDA's argument essentially hinges on reasoning applicable to individual handler pools, which focus on each separate handler's end uses of milk, rather than on market-wide pooling which looks at all milk handlers collectively. Under the market-wide pooling scheme of Milk Market Order No. 30, end use distinctions should be nullified by the equalization of payments among producers through the uniform minimum pricing requirements determined through blend pricing.

other milk handlers - on constitutional equal protection and fair trade practice grounds.

Due to the USDA's tacit admission that it differentiates between handlers of fluid milk and handlers of milk for manufacturing uses despite the lack of any statutory authority granted by Congress under the AMAA to do so, the deferential review and rational basis grounds relied upon by the USDA and the Seventh Circuit Court of Appeals are not applicable in the case. Review by this Court should be granted to protect the fundamental constitutional rights of Lamers and other fluid milk handlers in procuring equal treatment with other handlers under the AMAA.

II. The Dairy Industry's Changed Circumstances Warrants This Court's Review.

This Court has previously held that ". . . a regulation which for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." Nebbia v. New York, 291 U.S. 502, 525 (1934). This Court's conclusion was grounded upon the underlying principle that "the means selected shall have a real and substantial relation to the object sought to be attained." Id.

Ignoring the statutory policy of the AMAA declared by Congress in 7 U.S.C.§602(1), the USDA asserts that "[t]he fundamental purpose of the AMAA is to prevent milk producers *from flooding the fluid market* by establishing uniform prices that handlers must pay to milk producers regardless of the milk's end use." (Resp. Br., p.8)(emphasis added). Because fluid milk handlers strategically will not and economically cannot purchase more fluid milk than the handlers' customers will or can consume within current demand, it is impossible for producers to flood the fluid milk market.

In actuality, Congress enacted the AMAA to address the disparate treatment of *producers* arising out of the fluctuations in milk supply and demand. Lehigh Valley Cooperative Farmers, Inc. v. United States, 370 U.S. 76, 79-80 (1962)(emphasis added). Consequently, under the AMAA, payments to and from the producer-settlement fund are made so that each handler "eventually pays out-of-pocket an amount equal to the actual utilization value of the milk he has bought." Id.[2] However, the AMAA does not give the Secretary or the USDA statutory authority to impose mandatory participation in the milk regulatory system by Class I bottlers like Lamers while at the same time permitting voluntary participation by Class II, III, and

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[2] To further emphasize the point of Section I above, these pool payments specifically apply to each handler, not just fluid milk handlers.

IV manufacturers. By definition, all of these operators are "handlers." Thus, it is this mandatory versus voluntarily distinction arbitrarily drawn by the Secretary and the USDA in contravention to the statutory dictates of the AMAA which Lamers seeks this Court to review and redress on constitutional equal protection and unfair trade practice grounds.

All handlers compete for an adequate supply of Grade "A" milk, regardless of what class the end use of that milk might be. Allowing the milk marketing system to provide economic advantages for some handlers over others in procuring their milk supply is patently unfair and violates these other handlers' constitutional equal protection rights. Congress has dictated that all unfair methods of competition in commerce are declared unlawful. 15 U.S.C. §45(a)(1). By permitting Class II, III, and IV handlers to voluntarily pool their milk under Milk Market Order No. 30, the USDA promotes unfair competition against Class I handlers like Lamers by failing to provide equal protection as to all handlers and permits the wholesale circumvention of the milk marketing system it is supposed to uphold in an unfair and discriminatory manner.

Furthermore, the USDA's real life administration of the milk marketing system has created disorder, eliminated a stable competitive environment, and fostered monopolistic practices by non-fluid milk handlers. Statistical evidence

demonstrates that, since the 1930s when Congress implemented this system, millions of family farms have been lost, fluid milk consumption has fallen in comparison to the corresponding rise in cheese production, and production and handling segments of the dairy industry have been consolidated. Such dismal industry results should not be surprising from a system which now routinely permits as much as 70% of milk production to skirt the "market-wide" pool, thereby creating an economic incentive for non-fluid handlers of such depooled milk to avoid paying millions of dollars into the pool.

Because of the dramatically-changed circumstances of the dairy industry since the AMAA's enactment, this Court's review of how the USDA is wrongly administering the system is clearly warranted on equal protection and fair trade practice grounds. Lamers is entitled to just and equitable treatment, which the USDA is incapable of providing due to the manner it has chosen to differentiate between milk handlers. This Court can right the wrongs resulting from the USDA's faulty administration of the milk order system in the Upper Midwest by granting Lamers' petition.

III. The USDA's Administration Of Milk Market Order No. 30 Promulgates Disorderly Marketing Conditions.

The USDA asserts that the AMAA "requires only that handlers pay to producers at least a uniform *minimum* price," citing 7 U.S.C. 608c(5)(B). (Resp. Br., p. 8). What the USDA fails to point out is that its administration of Milk Market Order No. 30 does not meet this AMAA requirement because Class II, III, and IV handlers are allowed to pool and depool milk on an unrestricted basis. When handlers are permitted to opt out of the pool at will, their milk is unregulated and producers can no longer be assured of at least a uniform minimum price. The end result is disorderly marketing in contravention to the objectives of the federal milk order system. See, e.g., Public Hearing Docket No. AO-361-A39; DA-04-03, Hearing Transcript, p. 318 (Testimony of Dr. Edward Jesse, Federal Milk Marketing Order expert) and Ex. 27, p. 16 (Jesse and Cropp, *Federal Milk Marketing Order Pooling, Depooling, and Distant Pooling: Issues and Impacts*, Marketing and Policy Briefing Paper, No. 85, June 2004).

The USDA acknowledges that Class III handlers have an incentive to depool when price inversion occurs such that the price of Class III milk exceeds the price of Class I milk and/or the normal blend price, but erroneously refers to such market conditions as "rare instances." (Resp. Br., p. 3)(emphasis added). In reality, price inversion, with the resulting depooling, has occurred in 10 months in the last 24 months. Office of Federal Milk Market Administrator, Upper Midwest Marketing Area,

Federal Order No. 30 (reports for March 2003 - February 2005). Clearly, price inversion is currently a common market event which the USDA is handling in a manner wholly inconsistent with the AMAA's concept of market-wide pooling and its objective of orderly marketing. Judicial intervention is necessary to ensure fair and equitable treatment for all handlers and all producers under the AMAA. This Court should accept review of this matter.

CONCLUSION

The essence of Lamers' petition challenging the USDA's administration of the Upper Midwest milk order under the AMAA, albeit on due process rather than equal protection and unfair trade practice grounds, may best be summed up through the words of Justice Roberts:

> "As the order is drawn and administered it inevitably tends to destroy the business of smaller handlers by placing them at the mercy of their larger competitors. I think no such arrangement was contemplated by the Act, but that, if it was, it operates to deny the appellees due process of law."

United States v. Rock Royal Co-op, 307 U.S. 533, 587 (1939)(J. Roberts, dissenting).

For of all the foregoing reasons and for the reasons set forth in its petition for a writ of certiorari on file in the above-entitled case, the petitioner, Lamers Dairy, Inc., respectfully requests that this Court grant its petition for rehearing and undertake a review of this matter.

Respectfully submitted,

Attorney Robert N. Duimstra
Menn Law Firm, Ltd.
P.O. Box 785
Appleton, WI 54912-0785

Attorneys for Petitioner

March 2005

RULE 44.2 CERTIFICATION

The undersigned hereby certifies that the foregoing petition for rehearing is grounded upon intervening circumstances of a substantial or controlling effect and/or to other substantial grounds not previously presented. The undersigned further certified that the foregoing petition for rehearing is presented in good faith and not for delay.

Dated at Appleton, Wisconsin, this 30th day of March, 2005.

MENN LAW FIRM, LTD.

By: _____
Robert N. Duimstra
Attorneys for Petitioner,
LAMERS DAIRY, INC.

Post Office Address:
Menn Law Firm, Ltd.
222 North Oneida Street
P.O. Box 785
Appleton, WI 54912-0785

Telephone:
(920) 731-6631
Facsimile: (920) 734-0981